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(1)



In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 1202

W. D. HADEN COMPANY, PETITIONER

v.

L. METCALFE WALLING, ADMINISTRATOR OF THE
WAGE AND HOUR DIVISION, UNITED STATES DE-
PARTMENT OF LABOR

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH
CIRCUIT*

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The findings and conclusions of the district court (R. 100-104) have not been reported. The opinion of the circuit court of appeals (R. 108-113) is reported in 153 F. 2d 196.

JURISDICTION

The judgment of the circuit court of appeals was entered on January 18, 1946 (R. 113). A petition for rehearing was denied on February 18, 1946 (R. 118). The petition for a writ of certiorari was filed on May 4, 1946. The juris-

diction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether petitioner's dredgeworkers are employed as seamen within the meaning of the exemption provided by Section 13 (a) (3) of the Fair Labor Standards Act.

STATUTE INVOLVED

Section 13 (a) (3) of the Fair Labor Standards Act of 1938 (52 Stat. 1060, 29 U. S. C. 201) provides that

The provisions of sections 6 and 7 shall not apply with respect to * * * (3) any employee employed as a seaman * * *.

STATEMENT

Petitioner, a Texas corporation, dredges oyster shell from reefs in Galveston Bay and from the marshes of southern Louisiana which it sells to customers engaged in the production of goods for commerce (R. 8, 16, 101). In this work, petitioner operates dredge boats, barges, tugs, and other equipment (R. 101). The employees of the dredge boats, who are involved in this action, normally consist of a captain, three levermen, a chief engineer and three assistants, three loaders, six deckhands, two oilers and two cooks (R. 11). These employees work in two shifts, are on duty

12 hours a day and 24 days a month, and usually have three days shore leave at the end of each two-week period (R. 11).

The sole function of the dredges is to dig shell from the ocean floor and to dump the excavated shell into barges (R. 10, 64). The dredges have no motive power of their own and must be towed by a tugboat from job site to job site or from port to port (R. 12, 13, 92). They have no rudders or steering gear of any kind (R. 92-93). They remain at the dredge site continuously for months at a time and are towed to port only on rare occasions to protect them from storms (R. 91-92). After the dredge has been towed to the job site, a postlike metal cylinder on the back of the dredge, known as a spud, is lowered, and anchors are placed out at points to the right and left of the dredge (R. 12). A barge is towed alongside and fastened with ropes or steel cables (R. 12). The ladder carrying the cutting machinery and suction pipe is lowered and operations are begun (R. 12). The cutters loosen the deposit which is carried through the suction pipe (R. 12-13). Mud and some of the water are removed at a screen, and the shell is carried through a spout directly onto the barge (R. 12-13). From time to time, in order to distribute the shell load evenly, the barge is shifted by means of a cable and power-

driven winch drum, operated by the leverman (R. 13).

During the dredging operations, the captain has charge of the dredge and of all employees except the engineers (R. 56). The levermen operate the levers which control the machinery used in dredging operations (R. 56). The chief engineer, assistant engineers and oilers operate and maintain the dredging machinery and equipment (R. 56, 58). The loaders attend to the proper loading of the barges (R. 58-49). The cooks prepare the meals, wash dishes, and keep the galley clean (R. 88). The work of the deckhands is in the nature of common labor (R. 65, 66). They keep the dredge deck clean, adjust the lines in the movement of the barges during dredging operations, help pump water out of the barges while they are being loaded, and perform general work about the dredge as directed (R. 58). Infrequently they assist in switching barges, and, when the dredge is shut down, they spend their time scraping and painting (R. 63). None of the dredge employees have licenses as marine officers or sign articles as seamen (R. 15, 109).

In a suit brought by the Administrator of the Wage and Hour Division of the Department of Labor, to enjoin the petitioner from violating the Fair Labor Standards Act with respect to its dredgemen (R. 1-4, 50), the district court denied relief (R. 102-105). The circuit court of appeals reversed, holding that these employees are engaged

in "the mining and handling of shells as an industrial operation carried on by means of a floating mining plant," that their "dominant employment" is clearly "industrial" and their "maritime work" is only "incidental and occasional, taking but a small fraction of the work time" and that they "are principally employed not as seamen but as shell miners." It concluded, therefore, that they are not exempt under the provisions of Section 13 (a) (3) of the Fair Labor Standards Act (R. 112).

ARGUMENT

1. In denying the "seaman" exemption to petitioner's employees, the court below properly held that Section 13 (a) (3) was not intended to apply to employees whose predominant duties were not those of seamen. The same view has been taken by the three other circuit courts of appeals which have considered the question. *Walling v. Bay State Dredging & Contracting Co.*, 149 F. 2d 346 (C. C. A. 1), certiorari denied, No. 413, this Term; *Walling v. Great Lakes Dredge & Dock Co.*, 149 F. 2d 9 (C. C. A. 7), certiorari denied, No. 412, this Term; *Anderson v. Manhattan Lighterage Corp.*, 148 F. 2d 971 (C. C. A. 2), certiorari denied, No. 121, this Term. The *Bay State* and *Great Lakes* cases involved dredge workers and facts much the same as those in the instant case. The *Anderson* case dealt with employees on lighters whose principal duties related to trans-

ferring cargo. In all three cases, the non-nautical nature of the employees' principal duties as well as the legislative history of the exemption were stressed as grounds for denying the exemption.

These decisions and the decision below are also in accord with the Administrator's interpretation that the phrase "employed as a seaman", as used in Section 13 (a) (3), refers to one who performs aboard a vessel "service which is rendered primarily as an aid in the operation of such vessel as a means of transportation, provided he performs no substantial amount of work of a different character" and that "employees on floating equipment * * * engaged in dredging operations or in the digging or processing of sand, gravel, or other materials are not employed as 'seamen.'" See Interpretative Bulletin No. 11, July 1939, revised July 1943, paragraphs 3, 5.¹ This construction of Section 13 (a) (3), which excludes those whose duties do not relate principally to marine transportation, embraces all maritime workers whom Congress intended to exempt.² And

¹ The pertinent sections of the bulletin are printed in the Appendix, *infra*, pp. 10-13.

² A more elaborate discussion of the legislative history indicating the Congressional intent may be found in the briefs and memorandum filed by the Administrator in *Great Lakes Dredge & Dock Co. v. Walling*, No. 412, this Term, certiorari denied, November 5, 1945; *Bay State Dredging & Contracting Co. v. Walling*, No. 413, this Term, certiorari denied, November 5, 1945; and *Manhattan Lighterage Corp. v. Anderson*, No. 121, this Term, certiorari denied, October 8, 1945.

the fact that it is the principal occupation that is controlling suffices to explain the reasoning of the court below, characterized by petitioner as internally inconsistent (Pet. 10).

The decision below, in the same manner as the other circuit court of appeals decisions and the Administrator's interpretative bulletin, also gives effect to the wholesome rule that exemptions to the Fair Labor Standards Act are to be strictly construed. *Phillips v. Walling*, 324 U. S. 490.

2. Notwithstanding the unanimity of opinion of the four circuit courts of appeals that have decided the question in issue, petitioner suggests the existence of a conflict among the circuits (Pet. 8). But the only federal appellate decision under the Fair Labor Standards Act which petitioner specifically intimates is in conflict with the decision below is *Gale v. Union Bag & Paper Corp.*, 116 F. 2d 27 (C. C. A. 5), certiorari denied, 313 U. S. 559. Pet. 7, note 16. This case was decided by the very court that decided the instant case, and therefore cannot be said to present a conflict in the circuits even if the result is diametrically opposed to that reached here. The two decisions, however, are not in conflict. The duties of the barge tenders in the *Gale* case, unlike those of the dredge workers here, were primarily, if not exclusively, related to the operation and navigation of barges as means of water trans-

portation. The Administrator has recognized the applicability of the "seaman" exemption to barge tenders performing the normal duties "necessary and usual to the navigation of barges * * * unless they do a substantial amount of nonexempt work." See Interpretative Bulletin No. 11, as revised July 1943, paragraph 6, *infra*, p. 12.

Petitioner also relies upon decisions under other statutes. But decisions holding dredge workers to be seamen for other purposes cannot be considered in conflict with the decision below. The meaning of the term "seaman" for the "purpose of a particular statute * * * must be read in the light of the mischief to be corrected and the end to be attained." *Warner v. Goltra*, 293 U. S. 155, 158. See also *Norton v. Warner Co.*, 321 U. S. 565, 570-572; *South Chicago Co. v. Bassett*, 309 U. S. 251. In *Walling v. Bay State Dredging & Contracting Co.*, *supra*, the court observed that "as ordinarily used, the word 'seamen' would not include dredge-workers." 149 F. 2d at 348. A more liberal interpretation of the term, adopted to give broad scope to other remedial statutes, should not be assimilated into an exemptive provision of the Fair Labor Standards Act so as to narrow that Act's coverage.

CONCLUSION

The decision of the court below is correct and is in accord with the conclusions of all the circuit

courts of appeals that have passed upon the question. The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JUNE 1946.

APPENDIX

INTERPRETATIVE BULLETIN No. 11—SEAMEN EX- EMPTION

THE SCOPE AND APPLICABILITY OF THE EXEMPTION PROVIDED BY SECTION 13 (A) (3) OF THE FAIR LABOR STANDARDS ACT OF 1938. JULY 1943.¹ UNITED STATES DEPARTMENT OF LABOR, WAGE AND HOUR AND PUBLIC CONTRACTS DIVISIONS. OFFICE OF THE ADMINISTRATOR

1. Section 13 (a) (3) of the Act provides an exemption from the minimum wage provisions of section 6 and the maximum hours provisions of section 7, as follows:

The provisions of sections 6 and 7 shall not apply with respect to * * * any employee employed as a seaman * * *.

2. The provisions of sections 6 and 7 of the act apply only to "employees * * * engaged in (interstate) commerce or in the production of goods for (interstate) commerce." See Interpretative Bulletins Nos. 1 and 5. This bulletin will not deal with the question as to which "seamen" are so engaged, but will be directed solely to the scope of the exemption in section 13 (a) (3). This bulletin is intended to indicate the construction of this section which will guide the Administrator in the performance of his administrative duties unless directed otherwise by the au-

¹ Originally issued July 1939. Paragraph 6 revised July 1943.

thoritative ruling of the courts, or unless he shall subsequently decide that his prior interpretation is incorrect.

3. An employee will ordinarily be regarded as "employed as a seaman" if he performs, as master or subject to the authority, direction, and control of the master aboard a vessel, service which is rendered primarily as an aid in the operation of such vessel as a means of transportation, provided he performs no substantial amount of work of a different character. In our opinion, this exemption extends to employees performing such service on vessels navigating inland waters as well as on ocean-going and coastwise vessels.

4. The exemption extends to members of the crew such as sailors, engineers, radio operators, firemen, pursers, surgeons, cooks, and stewards if, as is the usual case, their service is of the type described in the preceding paragraph. However, concessionaires and their employees aboard a vessel ordinarily do not perform service subject to the authority, direction, and control of the master of the vessel except incidentally and do not come within the exemption under discussion.

5. The exemption does not extend to employees working aboard vessels whose service is not rendered primarily as an aid in the operation of the vessel as a means of transportation. Thus employees on floating equipment who are engaged in the construction of docks, levees, revetments, or other structures, and employees engaged in dredging operations or in the digging or processing of sand, gravel, or other materials are not employed as "seamen." For the same and other reasons,